

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
PROPERTY LIST

S CI 2017 5290

IN THE MATTER of an application under section 84 of the *Property Law Act 1958*

- and -

IN THE MATTER of an application for the modification of a restriction arising under a covenant in a transfer of land registered no. 0603348 affecting the land at 24 Rockley Road, South Yarra being the land in Certificate of Title Volume 03364 Folio 737 by:

MARQ SPV PTY LTD (ACN 623 172 494)

Plaintiff

GENERAL FORM OF ORDER

ASSOCIATE JUDGE: The Honourable Associate Justice Lansdowne

DATE MADE: 8 February 2018

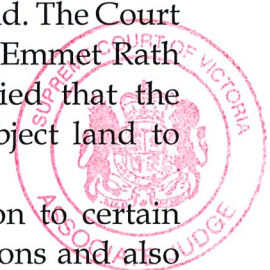
ORIGINATING PROCESS: Originating motion filed 22 December 2017

HOW OBTAINED: On return of the originating motion and subsequently in chambers

ATTENDANCE: Mr M Townsend, counsel for the plaintiff

OTHER MATTERS:

1. These proceedings concern an application to modify a covenant that currently limits the development of the subject land, known as 24 Rockley Road, South Yarra (**the Land**), to one dwelling or terrace of houses, and to otherwise declare the true purpose of the covenant.
2. The application is brought by Marq SPV Pty Ltd (ACN 623 173 494), nominee purchaser of the Land. The Court has had regard to the affidavit of Tyrone Emmet Rath affirmed 7 February 2018, and is satisfied that the plaintiff has sufficient interest in the subject land to bring this application.
3. This order provides for direct notification to certain registered proprietors, Owners Corporations and also



to mortgagees of land with the benefit of the covenant, and for a sign to be placed on the subject land.

4. The Court is satisfied that notice as provided by the orders below will sufficiently bring notice of the application to the attention of owners of the benefitting land.
5. These orders also require direct notification of the application to be given to the registered proprietor of the Land and to H S Consortium Pty Ltd (ACN 617 986 295), being the holder of Caveat AQ267531Q in respect of the Land.
6. This order is authenticated by the Associate Judge pursuant to Rule 60.02(1)(b) of the *Supreme Court (General Civil Procedure) Rules 2015*.

THE COURT ORDERS THAT:

1. By 12 February 2018, the plaintiff shall give notice of this proceeding and a copy of this order to each person who is a registered proprietor or Owners Corporation (as applicable) and registered mortgagee of the land identified on Schedule A to this order by pre-paid priority post at the last recorded address of that person appearing on the register held by Land Victoria, the Office of the Registrar Titles, or rate book, if any, or otherwise to the last known address of that person and to the street address of the land if different to those addresses.
2. The notice shall be in the form of:
 - (a) Schedule B to this order, together with Schedule C to this order, the Information for Objectors, attached thereto; and
 - (b) an authenticated copy of this Order.
3. By 12 February 2018, the plaintiff shall give notice of this proceeding and a copy of this order to Sanden Investments Pty Ltd and to HS Consortium Pty Ltd (ACN 617 986 295), by pre-paid priority post to their registered business addresses.



4. By 12 February 2018, the plaintiff shall display publicly a copy of the notice (without the Information for Objectors) which is to be enlarged to size A3 and encased in a waterproof cover and affixed in a conspicuous position on the property at 24 Rockley Road, South Yarra.
5. The public notice shall remain in place until 26 March 2018.
6. The further hearing of the proceedings is adjourned to 11 April 2018 at 10:30am in Associate Judges' Court 2, 436 Lonsdale Street, Melbourne.

DATE AUTHENTICATED: 8 February 2018

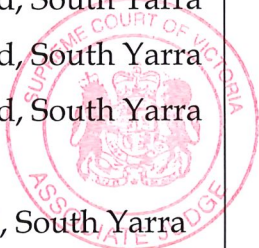

THE HON. ASSOCIATE JUSTICE LANSDOWNE



SCHEDULE A

LAND FOR THE BENEFIT OF WHICH NOTIFICATION IS TO BE GIVEN

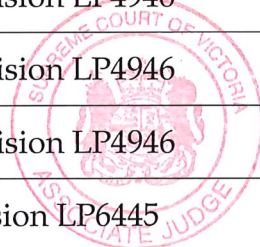
Street Address	Lot number on plan of subdivision
16 Rockley Road, South Yarra	Lot 39 on Plan of Subdivision LP4946
1/20 Rockley Road, South Yarra 2/20 Rockley Road, South Yarra 3/20 Rockley Road, South Yarra 4/20 Rockley Road, South Yarra 5/20 Rockley Road, South Yarra	Lot 41 on Plan of Subdivision LP4946
1/21 Rockley Road, South Yarra 2/21 Rockley Road, South Yarra 3/21 Rockley Road, South Yarra 4/21 Rockley Road, South Yarra 5/21 Rockley Road, South Yarra 6/21 Rockley Road, South Yarra 7/21 Rockley Road, South Yarra 8/21 Rockley Road, South Yarra 9/21 Rockley Road, South Yarra 10/21 Rockley Road, South Yarra 11/21 Rockley Road, South Yarra 12/21 Rockley Road, South Yarra 13/21 Rockley Road, South Yarra 14/21 Rockley Road, South Yarra 15/21 Rockley Road, South Yarra 16/21 Rockley Road, South Yarra 17/21 Rockley Road, South Yarra 18/21 Rockley Road, South Yarra 19/21 Rockley Road, South Yarra	Lots 11 & 12 on Plan of Subdivision LP4946 (Consolidated)
1/23 Rockley Road, South Yarra 2/23 Rockley Road, South Yarra	



3/23 Rockley Road, South Yarra 4/23 Rockley Road, South Yarra	
25 Rockley Road, South Yarra	Lot 10 on Plan of Subdivision LP4946
1/26 Rockley Road, South Yarra 2/26 Rockley Road, South Yarra 3/26 Rockley Road, South Yarra 4/26 Rockley Road, South Yarra 5/26 Rockley Road, South Yarra	Lot 45 on Plan of Subdivision LP4946
1/27 Rockley Road, South Yarra 2/27 Rockley Road, South Yarra 3/27 Rockley Road, South Yarra 4/27 Rockley Road, South Yarra 5/27 Rockley Road, South Yarra 6/27 Rockley Road, South Yarra 7/27 Rockley Road, South Yarra 8/27 Rockley Road, South Yarra 9/27 Rockley Road, South Yarra 10/27 Rockley Road, South Yarra 11/27 Rockley Road, South Yarra 12/27 Rockley Road, South Yarra	Lot 9 on Plan of Subdivision LP4946
1/28 Rockley Road, South Yarra 2/28 Rockley Road, South Yarra 3/28 Rockley Road, South Yarra 4/28 Rockley Road, South Yarra 5/28 Rockley Road, South Yarra	Lot 46 on Plan of Subdivision LP4946
30 Rockley Road, South Yarra	Lot 47 on Plan of Subdivision LP4946
1/31 Rockley Road, South Yarra 2/31 Rockley Road, South Yarra 3/31 Rockley Road, South Yarra	Lots 6 & 7 on Plan of Subdivision LP4946* (Notice to Owners Corporation only)
32 Rockley Road, South Yarra	Lot 48 on Plan of Subdivision LP4946



1/34 Rockley Road, South Yarra 2/34 Rockley Road, South Yarra 3/34 Rockley Road, South Yarra 4/34 Rockley Road, South Yarra 5/34 Rockley Road, South Yarra 6/34 Rockley Road, South Yarra 7/34 Rockley Road, South Yarra 8/34 Rockley Road, South Yarra 9/34 Rockley Road, South Yarra 10/34 Rockley Road, South Yarra 11/34 Rockley Road, South Yarra 12/34 Rockley Road, South Yarra 14/34 Rockley Road, South Yarra 15/34 Rockley Road, South Yarra 16/34 Rockley Road, South Yarra 17/34 Rockley Road, South Yarra 18/34 Rockley Road, South Yarra	Lots 49 & 50 on Plan of Subdivision LP4946* (Notice to Owners Corporation only)
38 Rockley Road, South Yarra	Lot 52 on Plan of Subdivision LP4946
42 Rockley Road, South Yarra	Lot 54 on Plan of Subdivision LP4946
44 Rockley Road, South Yarra	Lot 55 on Plan of Subdivision LP4946
46 Rockley Road, South Yarra	Lot 2 on Plan of Subdivision LP6445
48 Rockley Road, South Yarra	



SCHEDULE B

NOTICE OF APPLICATION TO MODIFY A RESTRICTIVE COVENANT AT 24 ROCKLEY ROAD, SOUTH YARRA (LAND) VOLUME 3364 FOLIO 737

THIS NOTICE is given by order of the Supreme Court of Victoria.

The purchaser of the Land, MARQ SPV Pty Ltd, has applied to the Court for an order to modify a covenant that is registered on the title to this Land, and to otherwise declare the true purpose of the covenant. The covenant is stated in Instrument of Transfer No. 0603348 dated 1 September 1909 (**Covenant**). The Covenant prohibits the owner of the Land from, among other things, the construction of more than one residence or terrace of houses, and a requirement that the frontage to Rockley Road not be reduced. The Covenant is not for the benefit of all land in the area, but only for certain lots within Plan of Subdivision LP4946.

The Plaintiff seeks to modify the Covenant so as to be able to construct six dwellings on the Land, and to make other consequential changes to the Covenant. The application is made under section 84 of the *Property Law Act 1958* (Vic). This application is different to a planning permit application to the local council under the *Planning and Environment Act 1987*. Any person who is entitled to the benefit of the Covenant and who wishes to oppose the application should:

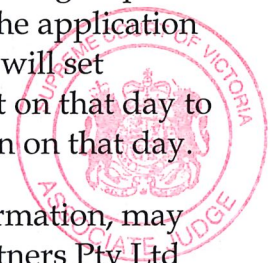
1. by 28 March 2018, give written notice to the plaintiff's solicitors "Planning & Property Partners Pty Ltd" of c/- Tyrone Rath, Duckboard House, Level 2, 91-93 Flinders Lane, Melbourne, Victoria 3000; and
2. attend the Supreme Court on Wednesday 11 April 2018 at 10:30am in Court 2, Ground Floor, 436 Lonsdale Street, Melbourne.

An attendance in person, or by a legal practitioner or other person that the Court permits, is required to make an objection. Objectors may wish to act as a group. Written objections without an attendance may not be considered. If the application is opposed, the Court will not decide the application on that day, but will set procedures for the progress of the case. If no person appears in Court on that day to oppose the application, the Court may hear and decide the application on that day.

Copies of documents relating to this application and any further information, may be obtained on request from Tyrone Rath of Planning & Property Partners Pty Ltd on 03 8626 9010 or by mail at Duckboard House, Level 2, 91-93 Flinders Lane, Melbourne, Victoria 3000.

Signed:

Dated:



SCHEDULE C

APPLICATIONS IN THE SUPREME COURT TO DISCHARGE OR MODIFY A RESTRICTIVE COVENANT – INFORMATION FOR OBJECTORS

This basic information is given by the Court to help you understand the significance of a notice you may have received from lawyers acting for a landowner in your neighbourhood telling you about an application to discharge or modify a restrictive covenant. You might also see a notice of the application posted on the land.

An application to the Supreme Court for the discharge or modification of a restrictive covenant is determined under the *Property Law Act 1958* whereas an application for planning permission is determined under the *Planning and Environment Act 1987*. These Acts are quite different both in purpose and process. An application to modify or discharge a restrictive covenant is often made so as to enable a planning application to be made later.

A restrictive covenant is like a promise made by a landowner not to use land in a certain way. Once made, the promise continues to bind those who buy the land later. A common example is a promise not to build more than one house on the land.

The promise is usually not made to everyone in the neighbourhood but is only for the benefit of certain land, or 'Lots' in a subdivision. If you receive a notice it is usually because the Court has already determined you have the benefit of the covenant and might be affected by the application. Only a beneficiary can object to the application.

The owner making the application will have already prepared and filed documents in the Court making a case for discharging or modifying the covenant. A beneficiary considering whether to object can first obtain the documentation about the application from the lawyer acting for the applicant and then decide what to do.

The process after notification starts with a hearing at which the Court sees if there are any objectors. If a beneficiary wishes to object, written notice must be given to the plaintiff's solicitors in accordance with the Notice. The objector must then come to Court or be legally represented in Court on the date stated in the Notice. On that day you can explain to the Court the basis of your objection without becoming a party in the case, that is a defendant. However, objections may not be considered by the Court unless you attend in person or have someone represent you. You do not have to engage a lawyer to represent you at the first hearing, but applications of this nature involve a degree of technicality and you may benefit from being represented or obtaining legal advice beforehand.

If you wish to place evidence before the Court you will need to be made a party in the case – that is become a defendant. Time is then given to prepare documents to oppose the application. This is best done with the assistance of a lawyer, and may be done together with other objectors.

When the documentation is done, the next step is for the Court to conduct a hearing to decide the case. Only objectors who have been joined as parties can be involved in that hearing, although of course other interested neighbours can attend and listen in open Court. The hearing will involve testing the facts and opinions in the documentation and hearing argument on the merits of the application. It usually takes one or two days. The Judge may visit the neighbourhood to get a better idea of the character of the area.

There is natural concern by prospective objectors about the legal costs of Court proceedings. Normally, the costs of the application are paid for by the applicant even if the application is



granted over the objection. But it may be different if a beneficiary objects without having any genuine or arguable grounds. That is why it is best to get legal advice first. If you wish to represent yourself, assistance is available from the Court's Self-Represented Litigant Coordinator. More information about that service is available on the Supreme Court's website.

